Defendant and Respondent.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

STUART LICHTER et al.,	B213449
Plaintiffs and Appellants,	(Los Angeles County Super. Ct. No. VC051486)
v.	
LEONARD J. MARTIN,	

APPEAL from an order of the Superior Court of Los Angeles County. Raul A. Sahagun, Judge. Affirmed.

Fainsbert Mase & Snyder and David S. White for Plaintiffs and Appellants.

Law Offices of Herb Fox and Herb Fox for Defendant and Respondent.

Appellants Stuart Lichter, Downey Studios, LLC, Industrial Realty Group, LLC and S.L. Properties, Inc. appeal from an order granting an anti-SLAPP motion¹ against their complaint for defamation. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Appellants own and control a large portfolio of industrial and commercial real estate, including a parcel of land located in Downey, California known as Downey Landing. Appellants specialize in converting brownfield sites and superfund sites into other uses. In November 2007, appellants were awarded the Phoenix award for their transformation of Downey Landing into a productive new use. While Downey Landing currently has a commercial retail center, a Kaiser-Permanent hospital and Downey Studios, it had previously been the site of a NASA/Boeing facility.

Downey Studios is managed by appellants and functions as an independent film facility in Los Angeles with 80 acres of indoor and outdoor production space. In 2004 and 2005, Downey Studios leased a portion of its premises to DreamWorks Productions for a film called "The Island." Respondent Leonard J. Martin worked as a prop maker for DreamWorks at Downey Studios from November 2004 to December 2004. In a Los Angeles Superior Court case entitled *Bernson v. City of Downey et al.*, (Super Ct. L.A. County No. VC046716) (*Bernson*), Martin and several coworkers alleged they began to experience health problems including dermatitis, sinus congestion, respiratory symptoms, headaches, dizziness, diarrhea, laryngitis and neurological problems after working at Downey Studios. They filed workers compensation claims as well as the *Bernson*

Code of Civil Procedure, section 425.16 provides for a special motion to strike a "SLAPP" suit, described as a meritless suit filed primarily to chill the defendant's exercise of his First Amendment rights. One of the purposes of the statute is to eliminate meritless litigation at an early stage. (*Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1113.) A motion to strike filed under section 425.16 is known as an anti-SLAPP motion.

There is some dispute as to whether Martin worked at Downey Studios from November 10, 2004 to December 3, 2004 or for five weeks.

complaint. Appellants were named defendants in *Bernson* and on September 3, 2009, Martin's claims against them were dismissed on summary judgment.

After he filed the lawsuit, Martin discovered that employees of the Kaiser Permanente facility at Downey Landing complained about similar illnesses on a blog on the Kaiser Papers website. Martin uploaded to the Kaiser Papers website a copy of his medical report, documents filed in and related to *Bernson* and copies of his claims to NASA and the General Services Administration.

On August 5, 2008, appellants filed a complaint against Kaiser Papers Website, Martin and others involved with the website for libel, false light, interference with economic advantage and violation of privacy. Appellants complained that the Kaiser Papers website "recklessly and with actual malice," published "charges of purported illegal dumping of toxic materials transported from Downey Studios; baseless allegations of 'hundreds' of serious debilitating illnesses and even deaths arising out of the 'toxic and radioactive contamination' at Downey Studios; that Plaintiff Lichter has committed the 'most heinous of all employer crimes,' engaging in wrongful and illegal corporate secrecy and cover-up of information regarding the Downey Studios property, including somehow making government documents 'disappear,' and coercion of other government entities in order to operate illegally, and; sweeping assertions that Plaintiffs have engaged in countless other wrongful and unlawful acts and more 'yet to be discovered.'"

Appellants further alleged that these statements were intended to "destroy" their "exemplary professional reputation" since the "Internet essentially serves as a bulletin board for the world. . . ." Attached to appellant's complaint, among other things, were Martin's medical record, the NASA claim, various litigation documents that were filed in the *Bernson* matter and a complaint filed by Martin with the U.S. General Services Administration.

Martin moved to strike appellant's complaint under the anti-SLAPP statute on September 17, 2008. (Code of Civil Proc., § 425.16.) It was granted on December 18, 2008. The trial court found that "[t]here is no competent evidence that defendant Martin was the source of most of the alleged libelous statements." The trial court further found

that the documents of which appellants complain, Martin's medical record and NASA claim, "are not libelous documents" and appellants failed to show a probability of prevailing on their claims. Appellants timely appealed.

DISCUSSION

I. Standard of Review

A motion to strike brought under the anti-SLAPP statute involves a two-step process. First, the defendant must make a threshold showing that the challenged cause of action is one arising from protected activity. Then, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 712.)

Our review on appeal is de novo. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269.) Although we consider the pleadings and any supporting and opposing affidavits, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] . . . accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212; *Soukup v. Law Offices of Herbert Hafif, supra*, 39 Cal.4th at p. 291.) To establish a probability of prevailing, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548.) "Only a cause of action that lacks 'even minimal merit' constitutes a SLAPP." (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 700.)

II. Probability of Prevailing

Appellants' primary contention on appeal is that they have a high probability of prevailing on their libel claims³ so that even if Martin's statements were protected

Although seven causes of action are alleged in appellant's complaint, the crux of the action rests on the libel claims against Martin and the other defendants. Moreover, neither party addresses the other causes of action in their appellate briefs. As a result, we

activity,⁴ his anti-SLAPP motion should have been denied. Civil Code section 45 defines libel as "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

Appellants attribute two postings on the Kaiser Papers website to Martin, which they contend are libelous: "1) a July 28, 2008 posting labeled 'Employee stories literally from the trenchs [sic]... Detailed stories relating some of the victim's experiences,' to which [Martin] attached copies of his medical records dated August 4, 2005.. under the heading '[m]edical document of Leonard Martin who became ill while working on site at Downey Studios;' 2) a March 19, 2008 posting of a bogus NASA claim dated May 7, 2007 listing [Martin] as the claimant and 'Exposure to Toxic and Hazardous Substances/Chemicals' as the basis for the 'claim,' and which attaches and incorporates by reference a claim for damages under the Federal Tort Claims Act, dated May 9, 2007, in which [Martin] states, among other malicious falsities, that 'he was exposed to various toxic substances during his respective employment at the Downey Studio Facility.' "We examine each in turn to determine whether appellants have shown the requisite "minimal merit" to their libel claim. We find they have not.

A. Medical Report

In his medical report, Martin's doctor lists Martin's many symptoms and complaints, including headaches, dizziness, diarrhea and sinus congestion which purportedly manifested during his five weeks at Downey Studios. After a physical examination, the doctor wrote, "IMPRESSION: Rhinitis, reactive airway dysfunction.

consider it waived and will bypass a review of the anti-SLAPP motion as to the non-libel causes of action.

Although appellants do not concede that Martin's statements arise from protected activity, they fail to support their limited arguments on this issue with any legal authority. We consider the issue waived. (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 522-523.)

This appears to be related to airborne contaminants that were at the Downey Studios.

The patient brought an air quality report for my review that found a number of molds."

We find this medical report to be a statement of medical opinion which is not libelous on its face. It is well settled that an essential element of defamation is that the alleged false statement be one of fact rather than opinion. (*Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 600; *Campanelli v. Regents of University of California* (1996) 44 Cal.App.4th 572, 578; *Jensen v. Hewlett-Packard Co.* (1993) 14 Cal.App.4th 958, 970.) In drawing the distinction between opinion and fact, we look to totality of the circumstances, putting ourselves in the place of an "average reader" and deciding the "natural and probable effect" of the statement. (*Hofmann Co. v. E. I. Du Pont de Nemours & Co.* (1988) 202 Cal.App.3d 390, 398.) The words themselves must be examined to see if they have a defamatory meaning, or if the gist of the statements has a defamatory meaning. In addition to the language, the context of a statement must be examined. (*Ibid.*) Taken in context, an average reader would not interpret the medical report to have a defamatory meaning. Instead, the words "impression" and "appears" inherently imply a subjective judgment about Martin's symptoms and their potential cause.

The case cited by appellants to support their contention that these are statements of fact hiding "behind the flimsy shield of 'opinion" does not help them. In *Wilbanks v*. *Wolk* (2004) 121 Cal.App.4th 883, 904-905, the court found that the defendant consumer watchdog made claims about a company that she stated were based on certain facts. However, she omitted significant mitigating facts. As a result, she could not claim that her statements about the company were mere opinion drawn from true facts. (*Id.* at p. 904.) Here, there is no contention that the doctor omitted facts that may have shown Martin did not have the symptoms he had or that he misdiagnosed the potential cause of Martin's illness.

B. NASA Claim

The other document with which appellants take issue is Martin's claim for damage to NASA dated May 7, 2007. The NASA claim itself does not include much information. Instead, it relies on an attached claim to the U.S. General Services Administration (GSA), which describes in detail appellants' acquisition of Downey Landing and alleges the presence of hazardous and toxic substances which were not adequately removed by appellants when the property was developed. Martin also alleges in the GSA claim that he sustained "permanent disability," including a long list of symptoms that manifested during his time at Downey Studios, as a result of appellant's failure to sufficiently remediate the property. We find that the statements made in the NASA claim are privileged under the litigation privilege embodied in Civil Code section 47, subsection (b). Subsection (b) protects a statement made during the course of a judicial or quasijudicial proceeding.

In determining whether an administrative body or agency possesses such quasi-judicial power so as to extend the privilege to an otherwise defamatory publication, we consider whether the administrative body is vested with discretion after investigation and consideration of evidentiary facts, whether it is entitled to hold hearings and decide the issue and, more importantly, whether its power affects the personal or property rights of private persons. (*Tiedemann v. Superior Court* (1978) 83 Cal.App.3d 918, 925.) "[S]trong policy reasons exist to assure free and open channels of communication between citizens and public agencies and authorities charged with the responsibility of investigating wrongdoing [citation.]." (*Ibid.*)

Here, the Federal Tort Claims Act specifically provides that a federal agency, "in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States. . . ." (28 U.S.C. § 2672.) NASA and the GSA clearly qualify as quasijudicial agencies whose proceedings are covered by the privilege. Appellants do not contend otherwise. Rather, they argue that there is no legal record that Martin ever filed

a claim to NASA, making it a "bogus" claim and not subject to the protections afforded under Civil Code section 47.

A review of the declaration relied on by appellants to support this contention, however, fails to reveal any evidence that Martin did not file the claim. Instead, the declaration by appellants' attorney merely lists the many reasons why it would have been "illogical" for Martin to submit a claim since NASA and the GSA had already been dismissed in the *Bernstein* action and it is dated after Martin's then-counsel began to withdraw as his counsel. Illogical or not, this is not prima facie evidence that the claim was never filed. Nor are appellants' arguments that the claim is untimely and without merit sufficient to revoke the privilege.

DISPOSITION

The order granting the anti-SLAPP motion is affirmed. Respondent is awarded costs on appeal.

BIGELOW, P. J.

We concur:

GRIMES, J.

FLIER, J.